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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRUNSKILL ASSOCIATES, INC., Plaintiff and Respondent, v. RAPID PAYROLL, INC., et al., Defendants and Appellants.	B206780 (Los Angeles County Super. Ct. No. BC294712)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed.

Irell & Manella, Gregory R. Smith, Morgan Chu, Michael H. Strub, Jr., Daniel A. Solitro for Defendants and Appellants.

Alston + Bird, Jonathan M. Gordon; Craig and Macauley, Stephen Wald, Daniel C. Reiser for Plaintiff and Respondent.

Rapid Payroll, Inc., licensed specialized computer software to payroll processing businesses. In 2001, Rapid Payroll cancelled the license on short notice, knowing that (1) the license was non-cancellable, and (2) the licensees depended on the software to run their operations. The evidence at trial showed that defendants interfered with the software license, caused its breach, and that they were not privileged to do so. We affirm the judgment and the jury's award of compensatory and punitive damages.

FACTS

Plaintiff and respondent Brunskill Associates, Inc. (Brunskill), operates Computer Payroll Company (CPC), which prepares employee paychecks and tax reports for its customers, among other services. Respondent's principals are Bill and Dena Brunskill. Mr. Brunskill began working in company payroll in 1969; his wife joined the business in 1974. After selling their first payroll business and engaging in other ventures during the 1980's, the Brunskills returned to payroll processing and formed CPC, which is a "dba" of Brunskill. CPC processed its first payroll in 1992, and earned $36 for it.

CPC uses a computer to process its clients' payrolls: the software program calculates paycheck deductions for Social Security, income taxes and so on; produces paychecks and W-2 income tax forms; and generates quarterly and year-end reports. CPC has always used a payroll processing software program developed by Ted Olsen and licensed by his company, Olsen Computer Systems (collectively, Olsen). CPC paid an initial fee to Olsen for the software, plus a monthly fee amounting to 6 percent of CPC's gross revenues.

Mrs. Brunskill and Olsen negotiated every phrase of the contract governing the computer software (the Software License). Olsen assured Mrs. Brunskill that he "would always be there to support me technically" with "whatever the system needed." The Software License cannot be unilaterally cancelled by the licensor. The contract reads, "The license cannot be canceled by [Olsen] unless [CPC] is in breach of this Agreement, but may be canceled by mutual agreement of both parties."[1] Olsen told Mrs. Brunskill that the non-cancellation clause meant "it guaranteed that he was going to be there. That the product would stay fresh. We'd continue to get updates and enhancements. He would keep it viable."

CPC soon became dependent upon the Olsen payroll software, and its business could not function without it. The Software License provides for unlimited maintenance and support and warrants that the system "will perform" so long as the Contract is in force. Maintenance and support of the software are essential to ensure that CPC complies with changing tax forms, tax withholding laws, and tax payment requirements for many different jurisdictions. In the event that Olsen dissolves and "has not provided any means of supporting [CPC's] needs," the Software License requires that Olsen deliver the software source code to CPC, so that the computerized material can be updated.

Appellant Paychex, Inc., is a competitor of CPC. It is one of the largest payroll processors in the United States: its revenue in 2007 was $1.9 billion. Paychex processes payrolls primarily for small businesses. Until the mid-1990's, Paychex used its own internally developed payroll processing software. However, the Paychex software was inadequate to handle the accounts of larger clients with more complex payrolls, a clientele that Paychex wanted to cultivate.

To acquire more sophisticated software, Paychex purchased Olsen Computer Systems in 1996, for $22.5 million. At the time, Olsen was generating licensing revenue of $2-3 million annually. Paychex did not want to merely obtain a license from Olsen because, as appellants state in their brief, Paychex did not want "to base its new business on software that it did not own and control." After purchasing Olsen—and renaming it "Rapid Payroll, Inc." —Paychex began to use in its business the payroll program developed by Olsen.

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1 Appellants concede in their brief that the Software License cannot be unilaterally cancelled by the licensor.

A 1995 memorandum to Paychex president and chief executive officer Thomas Golisano listed reasons for acquiring Olsen, and for making Olsen "an offer they can't refuse." These reasons included taking over the businesses of licensees who used the Olsen software ("a great way to leverage acquisitions of their customers"); undermining competitors by learning inside information about their business operations ("Gives us knowledge of where competitors might be more successful than we would like"); and stifling competition ("Makes it more difficult for national competition to form").

In a 1996 announcement to Olsen software licensees, Rapid Payroll stated that it would "aggressively" expand the number of licensees; it would maintain service levels because to do otherwise "wouldn't be fair" to licensees; and it would strive "to keep the [Olsen] software as the best product" to discourage licensees from changing to different software. The cover letter to licensees states, "There will be no change in our goals to provide you with the best software for your payroll processing service." Mrs. Brunskill testified that this was important, because if Rapid Payroll expanded the number of licensees, "that means that it's going to be a growing company. . . . We wanted them to have enough money to maintain the programs and, you know, keep updating the system so that it ran properly."

In December 1996, Golisano met with the Rapid Payroll licensees to allay their concerns about Paychex's acquisition of Olsen. Golisano told licensees that they would receive "Windows"-compatible software as an enhancement, and that they could avail themselves of "ancillary products of Paychex," such as 401K retirement plans and unemployment services, which licensees could use to lure new business. None of these products was ever made available to CPC.

Paychex's board of directors meeting minutes indicate that Golisano met with the licensees and "disarmed negative feelings." The minutes state that "there will be no new licenses issued and Paychex Payroll sales persons will not be selling the product." Paychex's 1997 "Strategic Plan" was to pursue an "aggressive posture towards buying current Rapid Pay licensees."

In July 1997, Rapid Payroll granted Paychex an “exclusive,” worldwide license for the Olsen software. Rapid Payroll president Walter Turek was aware that existing licensees had a right under the Software License to use the software at any new location where they wanted to start a business. By giving Paychex the “exclusive” rights to the software, licensees were foreclosed from opening in new locations because, according to Turek, “it means that we are the only ones that are going to be going into those geographical areas.”

From 1996 to 1998, Paychex’s subsidiary Rapid Payroll continued to support the Olsen software for companies like CPC that had existing software licenses. However, Mr. Brunskill testified that he never received a usable Windows version of the payroll processing component from Rapid Payroll. A version that Rapid Payroll gave to licensees was not usable in multiple work stations all accessing the software at the same time on a Windows network. Although Rapid Payroll produced a Windows product for remote software, CPC “couldn’t get it to work right.”

As “insurance” in case Rapid Payroll’s Windows program was inadequate, CPC signed up for a new software product called “Millennium” in 1999, from a different producer of payroll processing programs. CPC’s programmer spent an entire year just learning how to use Millennium, because it was a very sophisticated and complicated product. In addition to being complicated, it was expensive because it required both hardware and software upgrades, and was a “cash flow drain” for CPC. CPC began putting some new clients on Millennium in January 2000, but only if they demanded a Windows product. Otherwise, CPC continued to put new clients on the Rapid Pay software because it was much more efficient. CPC did not convert existing clients to Millennium. By August 2001, CPC had only 128 of its clients (out of hundreds) on Millennium.

Meanwhile, Rapid Payroll rewrote the Olsen software so it could operate a 32-bit version on a Windows network. The new software was completed in 2001, and Paychex used it in its own business; however, Rapid Payroll did not license the new software to CPC or other payroll companies, despite requests for it. According to Rapid Payroll president Turek, Rapid Payroll never intended to give licensees the new software, which would work on Microsoft's "Windows NT" operating system.

On August 21, 2001, Rapid Payroll sent a letter to CPC and the other Olsen software licensees, announcing that it would no longer license or support its payroll software starting on August 30, 2002 (the Cancellation Notice). The Cancellation Notice cited the reasons for discontinuing the Software License as "based primarily on the costs associated with continuing support and maintenance" so that "it is no longer economically feasible for [Rapid Payroll] to continue licensing the Software." Rapid Payroll refused to give extensions of time to licensees who requested it. Golisano made the decision not to give extensions. Further, Rapid Payroll did not release the software source code to licensees (as required by the Software License) so that licensees could continue updating the program's tax tables. Turek knew that the source code had to be released to licensees if the Software License was cancelled.

During a videotaped deposition played at trial, Turek testified that Rapid Payroll received $2 million annually from licensees, and spent less than $1 million to support the computer software, at the time that it issued the Cancellation Notice.[2] Turek, who signed the Cancellation Notice, testified that "I did not review any financial records" before sending the notice. Turek was unaware that there were no records or documents supporting the decision to cancel the Software License: he looked at no financial records, and he conducted no financial analysis. Turek knew that the Software License contained a non-cancellation clause. He sent the Cancellation Notice at the direction of Paychex president Golisano.

Appellants were aware that licensees would be unable to convert their clientele to a new software program within the one-year period set by the Cancellation Notice. One of appellants' witnesses testified that converting a single client to a new software system

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2 At trial, Turek listed additional outlays for real estate, human resources, finance costs, and so on, that meant Rapid Payroll was not receiving a million dollars in positive cash flow.

"could take two days. Could take a week, depending on complexity." Paychex itself needed at least 16 to 18 months to convert some of its own clients to a new version of the Olsen software. CPC thought that the conversion process for its clientele would take three years, if done in a non-disruptive manner.

In October 2001, CPC's attorney sent Paychex and Rapid Payroll a letter asking that the contractual obligations imposed by the Software License be honored. The letter stated that there was no basis for unilaterally terminating the contract, and that "suddenly withdrawing the license to my client . . . would result in a major disruption" and constitute unfair competition. No one responded to the letter.

One of the licensees sued Rapid Payroll over the Cancellation Notice, and obtained an injunction on behalf of all licensees. The injunction barred Paychex and Rapid Payroll from terminating software licenses and from withholding normal and customary updates, maintenance and support. The injunction began in June 2002, and expired in April 2006. Shortly before the injunction was entered, Rapid Payroll rescinded the Cancellation Notice. Golisano would not have rescinded the Cancellation Notice absent the court order

After Rapid Payroll issued the Cancellation Notice in August 2001, CPC attempted to convert client payroll data to the Millennium software system under severe time constraints, with disastrous effects. CPC accidentally made double tax payments during the conversion process, then had to struggle to get the overpayments refunded by the government. As Mrs. Brunskill described it, while attempting the conversion for its clients, CPC paid "over taxes, under taxes. It was chaos." While the Rapid Pay software was completely reliable, the Millennium software "crashed" daily, "and usually multiple times a day."

A CPC employee described taking a full day to convert "simple" clients who had five employees or less, because all of the data being converted had to be verified. She would start the conversion program, wait for an hour, "and then it would fail. And so that means I would have to start all over from the beginning. And trying to figure out why it failed, I'd have to go to Millennium and ask them to de-bug it and find out what the issues were." CPC employees—including customer service and sales people—were working on weekends during 2002 on the conversions. CPC received Rapid Payroll's rescission of the Cancellation Notice at the end of June 2002. Afterward, CPC slowed down the conversion, and methodically corrected problems that arose during the conversion.

Although Raid Payroll was enjoined from terminating the software licenses in June 2002, CPC was obliged to continue converting its clientele to Millennium. At that point, CPC had already converted over half of its clients to the new system, and it was not feasible for CPC employees to run both the Millennium and Rapid Pay software at the same time. Plus, CPC could not expand its business confidently knowing that Rapid Payroll might "screw us up" again.

In August 2003, CPC advised Rapid Payroll that it was terminating the Software License. The Software License gave CPC the right to terminate the contract "at any time [and] for any reason." CPC paid a total of $583,000 in licensing fees.

While using the Olsen/Rapid Pay software, CPC enjoyed 10 consecutive years of growth. CPC's revenue grew from $9,633 in 1992, to $286,690 in 1995, to $422,546 in 1996, to $1,458,116 in 1999, to $1,990,168 in 2000, and finally to $2,555,588 in 2001. CPC was processing the payrolls of all the casinos in the Coachella Valley, and had a trained, stable staff with very little turnover. CPC had purchased some acreage and was about to construct its own building.

The forced conversion to new software damaged CPC's business. The casinos fired CPC during the conversion process, when problems arose. CPC's income dropped 15 percent in 2003, then dropped another 6.5 percent in 2004. Capitalizing on CPC's conversion difficulties, Paychex distributed a letter to CPC's clients, referencing CPC's inability to provide for all of its clients' needs "due to problems in accuracy and payments." Paychex also sent out mass mailings to take advantage of CPC's service problems. To compound matters, Paychex sales personnel told CPC's clients that CPC had lost its software license.[3] Mrs. Brunskill testified that CPC's income declined "because of the lost clients."

Brunskill filed suit against Paychex and Rapid Payroll. On the eve of trial in May 2006, Rapid Payroll declared bankruptcy. The bankruptcy court rejected Rapid Payroll's strategic maneuver and lifted the automatic bankruptcy stay. Trial began on April 23, 2007. Two causes of action were tried before a jury: (1) breach of contract against Rapid Payroll, and (2) interference with contract against Paychex, Thomas Golisano and Walter Turek. Appellants did not call any damages experts to testify at trial.

A verdict in favor of Brunskill was reached on June 27, 2007. The jury found that appellants "intentionally caused Rapid Payroll to breach its contract with Brunskill Associates." The jury further found that Paychex did not act to protect its investment interest in Rapid Payroll, and that Golisano and Turek did not act to protect Rapid Payroll. Brunskill was awarded $15 million in compensatory damages. In a subsequent phase, the jury awarded punitive damages of $1 million against Paychex, $10 million against Golisano, and $10,000 against Turek. An amended judgment was entered in favor of Brunskill on February 5, 2008. A timely appeal was taken from the judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).)

DISCUSSION

Request for Judicial Notice

Appellants ask us to take judicial notice of three cases. One is an unpublished opinion from Division Five of this District, *Accuchex v. Paychex, Inc.* (B183920), filed August 9, 2006. An unpublished opinion "must not be cited or relied on by a court or a party" unless it is relevant under the doctrines of law of the case, res judicata, or collateral estoppel. (Cal. Rules of Court, rule 8.1115(a), (b)(1).) Judicial notice is denied as to the *Accuchex* opinion because it is not relevant to this appeal.

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[3] This testimony was hearsay, but appellants made no objection to it when it was given.

Appellants ask us to cite an unpublished Ninth Circuit opinion, *The Business Office Inc. v. Golisano* (2008) 275 Fed.Appx. 578. On its face page, the opinion reads, "This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. [rule] 36-3." Rule 36-3(a) states: "Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Even if unpublished federal opinions "have persuasive value" (*Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 34), we elect not to rely upon a cursory analysis of a motion for summary judgment. Judicial notice is denied as to the *Business Office* opinion.

Finally, appellants ask us to judicially notice a federal bankruptcy order regarding the Chapter 11 reorganization plan of Rapid Payroll. The order lifts the automatic bankruptcy stay and allows Rapid Payroll's creditors to continue their litigation against Rapid Payroll. We take judicial notice of the order lifting the bankruptcy stay, to the extent that it authorizes us to process this appeal.

Claims of Instructional Error

Standard of Review

Appellants claim two instructional errors. The adequacy of jury instructions "is a legal issue subject to the de novo standard of appellate review." (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24.) We view the facts in a light favorable to appellants, on the assumption that the "the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor." (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1087; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 773; *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1152, fn. 2.) A judgment will not be reversed for instructional error unless it is probable that the jury was misled; the error is prejudicial because a result more favorable to the appellant probably would have been reached; and there was "a miscarriage of justice." (Cal. Const. art. VI, § 13; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574; *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, *supra*, 12 Cal.App.4th at p. 771.)

Instruction on the Corporate Ownership Financial Interest Privilege

Paychex asserts that the trial court misinstructed the jury on the cause of action for interference with contract. Paychex contends that it was entitled to interfere with the contractual relationship between Rapid Payroll and CPC and to direct Rapid Payroll to breach the Software License. Paychex reasons that it was privileged to direct the breach of contract because it was merely acting to protect its financial interest or promote Rapid Payroll's welfare.

A stranger to a contract may be liable for intentionally interfering with the performance of the contract. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) "'The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable.'" (*Id*. at p. 1127.) The law protects contracts "against frustration *by outsiders* who have no legitimate social or economic interest in the contractual relationship," i.e., "interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514.) Paychex contends that it is not a stranger to the contract, or an outsider, or an interloper, because it is the parent corporation of Rapid Payroll.

As the parent corporation of a subsidiary, Paychex has a financial interest in the business of Rapid Payroll.[4] This interest does not give Paychex carte blanche to induce the breach of its subsidiary's contracts. "[O]wnership and control of an entity do not by themselves relieve a defendant from tort liability for interfering with the entity's contracts. [Citations.] Rather, the tort liability of an owner, director or manager depends upon whether he was acting to protect the interests of the entity. Only if he was acting to protect the entity's interests may he escape liability." (*Shapoff v. Scull* (1990) 222

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[4] A parent corporation is one that has working control through stock ownership of a subsidiary corporation. (Corp. Code, §§ 175, 189; *Culcal Stylco, Inc. v. Vornado, Inc.* (1972) 26 Cal.App.3d 879, 882, fn. 2.)

Cal.App.3d 1457, 1466, disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra,* 7 Cal.4th at p. 510.) "[T]he privilege of a parent or subsidiary corporation to interfere with the contractual relationship of the other 'is at most a qualified one dependent for its existence upon the circumstances of the case.' [Citation.] A resolution of this issue turns on the parent or subsidiary's predominant purpose in inducing the breach of contract. [Citation.] Thus, the question on the issue of privilege is a question for the trier of fact." (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 883; *Culcal Stylco, Inc. v. Vornado, Inc.*, *supra*, 26 Cal.App.3d at p. 883; *Sade Shoe Co. v. Oschin & Snyder* (1984) 162 Cal.App.3d 1174, 1181.)

In their brief on appeal, appellants identify three "relevant questions." First, does Paychex have "the requisite financial interest" in Rapid Payroll? Second, was Paychex acting to protect its financial interest? Third, did Paychex "employ improper means"? Appellants cite *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 319, as the source of the three questions.[5]

The instruction given in this case accurately states the law. It reads, "To claim the 'privilege,' the party asserting the privilege has the burden of proof to show two things: 1) that he does not employ improper means; ***and*** 2) that in the case of the parent company it was acting predominantly to protect the parent's investment in the subsidiary corporation when they induced the breach of contract . . . . [¶] As the owner of 100% of the stock of . . . Rapid Payroll, [Paychex] may assert this 'privilege' only if it shows that the predominant purpose in inducing Rapid Payroll to breach the contract with [CPC] was to protect its financial interest in the stock of Rapid Payroll."

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5 The Supreme Court was analyzing a cause of action for interference with prospective business advantage, not a claim that someone interfered with an existing contract. The court wrote, "there is no allegation alleged that appellants had a contract with anyone which was breached as the result of the activities of defendants or any of them." (69 Cal.2d at p. 319.)

The instruction references Paychex's 100 percent ownership of Rapid Payroll, which covers the "requisite financial interest" aspect. The instruction also inquires whether Paychex was acting "to protect its financial interest" in Rapid Payroll, which addresses the second issue point raised by appellants. Paychex's financial interest in Rapid Payroll is that of a stockholder. "The financial interest privilege . . . is an interest in the nature of an investment, i.e., interest of a . . . stockholder and the like." (*Sade Shoe Co. v. Oschin & Snyder*, *supra*, 162 Cal.App.3d at p. 1181.) The instruction acknowledges that Paychex had to prove that it was protecting its interest as a stockholder, its "investment interest" in its subsidiary. Finally, the instruction directs the jury's attention to the issue of "improper means," the last point raised by appellants.

In truth, appellants are not challenging the adequacy of the instruction, which contains each of the elements that appellants have identified as being necessary for a proper instruction. Instead, appellants are challenging the sufficiency of the evidence in support of the jury's findings. If the trier of fact finds that a parent's act of inducing its subsidiary to breach an agreement "was not for a proper purpose," this finding must be upheld if supported by substantial evidence. (*GHK Associates v. Mayer Group, Inc.*, *supra*, 224 Cal.App.3d at p. 883.) The substantial evidence rule similarly applies if the trier of fact finds that the parent was not acting to protect its financial interest.

Appellants first argue that Paychex "had the required financial interest" in Rapid Payroll. With 100 percent ownership by Paychex, we can take that point as a given. Appellants next argue that "Paychex was acting to protect its financial interest" in Rapid Payroll. The evidence at trial showed that Rapid Payroll earned $2 million annually from licensing fees, while the cost of supporting the software was $1 million. Thus, Rapid Payroll received a profit of $1 million for its licensing business. Given this evidence, the jury could reject Paychex's claim that it interfered with the Software License based on cost considerations. Rapid Payroll's president Turek admittedly did not review his own company's financial information before he sent out the Cancellation Notice at the direction of Paychex president Golisano. There was no evidence that Paychex or Rapid Payroll suffered any financial losses due to the software licenses, and the jury could have believed Turek's deposition testimony that his company earned a $1 million profit annually on the software licenses.

In short, a trier of fact could find that that Paychex's claim of protecting its financial interest was pretextual. By forcing Rapid Payroll to terminate the software licenses—instead of continuing to support them, or selling the licensing rights to the licensees or to a third party—Paychex completely destroyed the value of its $22.5 million investment in Rapid Payroll. Rapid Payroll's only business was licensing the payroll software. Appellants' actions left Paychex holding stock in a company that is now bankrupt. By sending the Cancellation Notice, appellants exposed Rapid Payroll to the threat of litigation, as Turek knew that the Software License cannot be unilaterally cancelled by the licensor.

As appellants acknowledge in their brief, the financial interest privilege "is not absolute and can be lost when the underlying motive is principally to harm another." "'A thoroughly bad motive, that is, *a purpose solely to harm the plaintiff*, of course, is sufficient to exclude any apparent privilege which the interests of the parties might otherwise create, just as such a motive will defeat the immunity of any other conditional privilege. If the defendant does not act in a bona fide attempt to protect his own interest or the interest of others involved in the situation, he forfeits the immunity of the privilege. . . . *Conduct is actionable, when it is indulged solely to harm another, since the legitimate interest of the defendant is practically eliminated from consideration.*'" (*Show Management v. Hearst Pub. Co.* (1961) 196 Cal.App.2d 606. 619.)

Appellants attack the sufficiency of the evidence underlying the jury's findings of improper motivation. However, the jury could conclude that Paychex's purpose in interfering with the Software License was not to protect its interest in Rapid Payroll. Instead, its motive was to first gain exclusive control of the Olsen software, then destroy its competitors' businesses by giving inadequate notice before terminating the computer program that enabled the competitors to run their businesses. This is borne out by a 1995 memorandum indicating that Paychex's reason for acquiring Olsen was "to leverage acquisitions" of licensees and their customers, and to stifle competition. The jury could, and did, reject all of Paychex's financial rationales and justifications for terminating the software licenses.[6]

Instruction on the Manager's Privilege

In some circumstances, a manager or agent may be privileged to counsel his principal to breach a contract. "'The privilege to induce an otherwise apparently tortious breach of contract is extended by law to further certain social interests deemed of sufficient importance to merit protection from liability. Thus, a manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests.'" (*Huynh v. Vu* (2003) 111 Cal.App.4th 1183, 1194.)

Appellants Golisano and Turek asserted the manager's privilege defense in this case. The court instructed the jury that the privilege applies if "their predominant purpose in inducing Rapid Payroll to breach the contract with Plaintiff was to protect the separate corporate entity, Rapid Payroll."[7] Appellants contend that the instruction is "flatly wrong" because it "focus[es] on the interests of [Rapid Payroll] rather than Paychex . . . ."

The instruction is correct. "Whether or not [the individual defendants] were privileged to cause the corporation to discontinue its relations with plaintiffs, in the belief that such a course of action was in the best interests of the corporation, is a matter of defense, to be decided by a resolution of the factual issues presumptively involved." (*Collins v. Vickter Manor, Inc.* (1957) 47 Cal.2d 875, 883. Accord: *Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1522: "[T]he tort liability of an owner,

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6 In light of the evidence that Paychex was not acting to protect its financial interest, and had harmful motives, we need not reach appellants' argument that "Paychex did not employ 'improper means' when it terminated the [Software] License."

7 The "predominant purpose" language appears in the instruction proposed by appellants.

director or manager depends upon whether he was acting to protect the interests of the entity" that entered the contract. (*Shapoff v. Scull*, *supra*, 222 Cal.App.3d at p. 1466.)

Rapid Payroll is the company whose contract is the subject of this litigation. The challenged instruction properly directs the jury's attention to the issue of whether the individual defendants' predominant motive was to protect the interests of Rapid Payroll. The jury could find that the actions of Turek and Golisano caused Rapid Payroll to become worthless and bankrupt, because its only business was supporting the Software License and collecting licensing fees. Before appellants interfered, Rapid Payroll showed annual profits of $1 million.

Golisano did not testify at trial. Although the jury heard Golisano's deposition testimony, the panel rejected his rationale that the Rapid Pay software was not worth supporting. In any event, there was no evidence that Golisano believed that bankrupting Rapid Payroll was in the best interests of Rapid Payroll *or* Paychex. In addition, there is no evidence that Golisano was an agent or manager of Rapid Payroll, to confer any privilege on his directive to breach the Software License. Turek never examined Rapid Payroll's financial information before sending out the Cancellation Notice, so the jury could reasonably find that Turek was not acting in the best interests of his principal.

Finally, we hesitate to afford a privilege for the actions of Turek or Golisano, as a matter of social policy. Appellants set out to destroy their competitors in an insidious manner, by making false promises to CPC and the other licensees that Rapid Payroll would maintain service levels, provide "the best software," and expand the number of software licenses. At the same time, appellants were secretly intending not to sell any new licenses and to steal clients from the licensees, who depended on the Olsen software to stay in business. After lulling licensees into a false sense of security and dissuading them from converting to new payroll software, appellants pulled the rug out from under the licensees by cancelling the software licenses without adequate warning. This is not the type of "manager's advice" that the courts should protect or encourage. In *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 35, the Supreme Court wrote that justification for inducing a breach of contract may exist when a person acts "to protect an interest that has greater social value than insuring the stability of the contract." The court added, "A party may not, however, under the guise of competition actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over that competitor." (*Id.* at p. 37.)

Damages Award

Limitation of Damages Clause

Appellants argue that the Software License restricts CPC's damages. Paragraph 12 of the Software License states that Olsen's liability "shall not exceed the amount of payments made by [CPC] to [Olsen] . . . ." CPC "further agrees that [Olsen] shall not be liable in any event for any damages incurred by [CPC] . . . nor shall [Olsen] be liable for any lost data, lost profits or for any claim for damages by or against [CPC] except for a claim of patent or copyright infringement as provided herein."

Appellants maintain that Paragraph 12 limits CPC's recovery to $583,000, which is the total amount of licensing fees that CPC paid for the Software License. Appellants asked the trial court to interpret Paragraph 12 as a matter of law. The court declined to do so. The jury was asked whether Paragraph 12 is applicable to Rapid Payroll's breach of contract. The jury answered "No."

The parties agree that the "critical question" is whether Paragraph 12 was intended to apply when, as here, the licensor unilaterally terminates the Software License, in violation of the non-cancellation clause. Appellants and respondent part ways on what the evidence shows. Citing testimony from Olsen and Mrs. Brunskill, appellants maintain that "there is no dispute in the extrinsic evidence" relating to the contracting parties' intent at the time they entered the Software License agreement. As a result, appellants assert, there was no disputed issue of fact for a jury to resolve. Citing different portions of the testimony, respondent replies that appellants "misstate the evidence."

Extrinsic evidence may not be used to add to, detract from, or vary the terms of a written contract; however, parol or extrinsic evidence is admissible to explain the meaning of a written instrument. (Code Civ. Proc., § 1856; *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37-40; *WYDA Associates v. Merner*

(1996) 42 Cal.App.4th 1702, 1710.) Evidence of "the circumstances and negotiations of the parties in making the contract is both relevant and admissible" and the contracting parties are allowed to testify about their actual intentions. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 437.) In this case, extrinsic evidence from the contracting parties revealed an ambiguity in the limitation of damages clause. The jury was entitled to resolve any conflicts in the testimony relating to the negotiation of this contractual term. "[W]hen, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) The mere fact that appellants and respondent cite entirely different portions of the trial testimony in support of their respective positions demonstrates the existence of a conflict in the evidence, presenting a triable question for the jury.

Based on the evidence presented at trial, the jury could find that Paragraph 12 does not apply to the facts of this case. The evidence shows that at the time that the Software License was entered, Olsen assured Mrs. Brunskill that the limitation of liability clause was intended only to limit claims related to defects in the software: if these defects caused CPC to make errors in client payrolls, CPC could not sue Olsen for lost clients and lost profits. Mrs. Brunskill testified that when she asked Ted Olsen what Paragraph 12 meant, he said, "that if I screw up on a client or the program screws up and we don't make a tax payment correctly or a union payment or an insurance payment . . . that the client couldn't . . . come back and sue Olsen. Nor could I sue Olsen for making me get in trouble with my clients. And that was the total use of that clause. That's exactly what he said it was for." Mrs. Brunskill's written notes of her discussion with Olsen reflect this interpretation of Paragraph 12.

Ted Olsen did not recall whether he and Mrs. Brunskill discussed Paragraph 12 (or any other provision in the Software License), 16 years earlier. When asked if he told any licensees that the purpose of Paragraph 12 "was to protect you in case there was an unintended defect in the software," Olsen replied that "I probably did." In deposition testimony read to the jury, Olsen stated that Paragraph 12 did not give him "carte blanche to breach the contract intentionally."

Substantial evidence supports a finding that the intent of the contracting parties was to limit the applicability of Paragraph 12 to instances in which the Olsen software failed and caused errors to be made in CPC's business. This is not a case of software failure. Instead, it is a case in which the licensor simply terminated the Software License, causing repercussions to its licensees. Appellants' claim that the evidence indisputably supports their position is not well taken. We cannot disturb the jury's resolution of the contractual interpretation issue, because it hinges upon the credibility of the witnesses who negotiated the Software License. The jury believed Mrs. Brunskill, who was assured by Olsen that the "total use" of Paragraph 12 was to cover software defects; the jury was not swayed by Olsen's vague recollections. As a result, Paragraph 12 does not restrict CPC's damages to the $583,000 in licensing fees that it paid.

In sum, (a) the issue of contract interpretation was properly decided by the jury because extrinsic evidence revealed an ambiguity in the contract and a need to determine the contracting parties' intentions, and (b) there is substantial evidence supporting the jury's findings. In light of our conclusion, that we need not reach the issues of whether the limitation of damages provision is unconscionable, or whether the clause is invalidated by the Commercial Code.

Compensatory Damages Award

Appellants challenge the jury's award of compensatory damages. They claim that CPC's expert did not show that "anything appellants did caused any harm" to CPC. Instead, appellants argue, the expert "*assumed* that from 2001 forward, but for the Cancellation Notice, [CPC's] gross revenue would have grown at a constant rate . . . ." Appellants posit that other factors—such as "poor management and economic conditions"—"could have affected" CPC's business during this period.

There was ample testimony that CPC's business was damaged when appellants breached the terms of the Software License, and terminated the contract upon short notice. After receiving the Cancellation Notice, CPC attempted to convert client payroll data to a new operating system, under severe time constraints. Appellants did not release the Olsen software source code to licensees, so that tax tables could be updated. When CPC experienced difficulties converting to new software, appellants capitalized on CPC's difficulties by distributing a letter to CPC's clients that referenced CPC's inability to provide for clients' needs due to problems it was experiencing with the new software. Appellants' sales personnel told CPC's clients that CPC had lost its software license. CPC lost many clients by making errors in processing their payrolls during the sudden, forced conversion to new software.

From this, the jury could conclude that CPC was damaged due to appellants' actions, because they made it impossible for CPC to provide adequate services to its clientele. In addition, there was evidence that appellants acquired Olsen for the express purpose of stealing clients from competitors like CPC. As stated in a memorandum to Golisano, acquiring Olsen was "a great way to leverage acquisitions" of customers. Because CPC was entirely dependent upon appellants' continued support for the Olsen software, in order to process client payrolls, it follows that CPC's business was damaged when appellants suddenly announced that they were pulling the plug on the software.

Testimony about lost profits may be based on historical business experience as to the profits that could reasonably be made, had the plaintiff's business not been interrupted by the defendant's acts. (*Gainer v. Storck* (1959) 169 Cal.App.2d 681, 688.) "'[W]here the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.'" (*Id*. at pp. 687-688; *Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 689.) The party that commits a wrongful act cannot complain if his conduct made it impossible for plaintiff to realize a profit, and creates a situation in which the probable profits must be estimated, not computed. (*Sanchez-Corea v. Bank of America* (1985) 38

Cal.3d 892, 908; *Natural Soda Prod. Co. v. City of L.A.* (1943) 23 Cal.2d 193, 200; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143.) "[W]hile a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment." (*Stott v. Johnston* (1951) 36 Cal.2d 864, 875.) "'Liability cannot be evaded because damages cannot be measured with exactness.'" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921.)

In this instance, testimony about CPC's uninterrupted growth from its inception, the impact of the Cancellation Notice on CPC's ability to operate its business and the consequential decline in clients and profits came from CPC's managerial employees—including the Brunskills—who personally witnessed the course of events. CPC's financial expert did not have to show causation, because other, more qualified witnesses did so at trial.

CPC operated an established business, since 1991. The testimony showed that its revenues grew steadily from $9,633 in 1992 to $2,555,588 in 2001, when appellants sent the Cancellation Notice. After CPC experienced difficulties in making a speedy conversion to a new software system, its revenue declined precipitously. In the year *before* the conversion, more than 400 new clients joined CPC's business. In 2002 and 2003, CPC lost 867 clients due to the conversion "pandemonium" in its office.

According to Mr. and Mrs. Brunskill, the reason for this drop in profits was the forced conversion to new software. The conversion created errors and service problems that caused hundreds of clients to terminate CPC's services, when the mistakes came to light. Plus, all of CPC's employees, including its sales staff, had to help with the conversion process and handle calls from irate customers instead of marketing CPC's services to potential new clients. CPC stopped receiving new business referrals because its reputation was damaged by the service problems. Appellants presented no evidence that CPC's loss of clientele or lost profits were caused by poor management or a poor economy.

CPC's expert presented a damage model showing CPC's losses. There were different scenarios depending on whether the jury accepted business growth levels of 20, 25, 30 or 35 percent annually. At $15 million, the jury came in below the lowest amount of loss identified by the expert.[8] To the extent that appellants believe the expert testimony regarding CPC's losses was inherently flawed because of the method of calculation that was used, we observe that "the method of calculation selected by [the expert] simply goes to the weight to be given [to] expert opinion evidence. It is for the trier of fact to accept or reject this evidence, and this evidence not being inherently improbable provides a substantial basis" for the jury's damages award. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 469-470.) Appellants presented no evidence to counter the testimony of respondent's expert.

The court instructed the jury that "[t]erminal value is one method for determining if future profits were lost by a company." We need not reach appellants' attack on the terminal value testimony and instruction, because their argument is premised on a factual assumption that terminal value is a component of the damages award. "To preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a special verdict form that segregates the elements of damages." (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346; *Sharp v. Bragg Crane Service, Inc.* (1985) 168 Cal.App.3d 993, 995-996.) Appellants did not ask the jury to segregate the elements of the damage award. Instead, they agreed to ask the jury a single question: "What damages, if any, did Brunskill Associates prove by a preponderance of the evidence were caused by defendants' conduct and decisions?"

Without a segregation of the elements of the damage award, it is impossible to ascertain whether the jury's award covers damages for expenses actually incurred, damages for lost clients, damages for lost past profits or lost future profits, or whether the

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[8] Using a 20 percent annual growth rate, the expert presented losses of $17,785,858. His highest estimate of loss was $63,827,077, using a 35 percent annual growth rate.

jury used a "terminal value" damages measure (based on a hypothetical sale of CPC's business). Where, as here, a defendant claims that there was improper expert testimony about damages, the defendant's failure to request a special verdict on damages waives the issue on appeal. (*Heiner v. Kmart Corp.*, *supra*, 84 Cal.App.4th at p. 346; *Sharp v. Bragg Crane Service, Inc.*, *supra*, 168 Cal.App.3d at pp. 995-996; *English v. Lin* (1994) 26 Cal.App.4th 1358, 1369.)

Punitive Damages Award

a. Substantial Evidence Supports the Jury's Award of Punitive Damages

Appellants contend that the punitive damages award "does not satisfy the statutory standard for punitive damages under Civil Code section 3294" because "Paychex did not cancel the license to injure Computer Payroll . . . ." Civil Code section 3294 authorizes damages to punish the defendant "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Malice is shown by an intent to injure the plaintiff. Oppression means despicable conduct that subjects a person to unjust hardship in conscious disregard of that person's rights. Fraud means an intentional misrepresentation, deceit or concealment of a material fact known to the defendant with the intent of causing injury. (Civ. Code, § 3294, subd. (c).) We review the award to see if these elements are supported by substantial evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 605-606.)

The evidence supports a finding of oppression, fraud, and malice. When Paychex acquired Olsen, it did so with full knowledge that companies using the Olsen payroll software, like CPC, were entirely dependent upon the software to run their businesses. Just prior to purchasing Olsen in 1996, Paychex outlined its strategy in a memorandum to Paychex president Golisano, which included stealing clients from competitors and stifling competition. Golisano represented to licensees at a meeting in 1996 that Paychex would expand the number of licensees and maintain its commitment to supporting the Olsen software. Yet Paychex internal documents indicated that company had precisely the opposite intentions: it was not going to sell any new licenses and wanted to deemphasize the licensing business. Indeed, instead of planning to support the software licensees, Paychex's 1997 strategic plan was to take over the licensees' businesses.

Lulled by appellants' false assurances of continued support, licensees like CPC did not aggressively move to convert their businesses to new software systems. As appellants knew, the Cancellation Notice did not give CPC adequate time to convert to a new software system. In addition, appellants refused to release the software source code to ensure that the software was properly updated, in violation of the Software License terms, so that licensees could mitigate the harm caused by using outdated tax forms. As a result, CPC made errors in payroll processing that damaged its reputation and caused clients to leave. After disrupting CPC's ability to process payrolls, appellants capitalized on CPC's difficulties by soliciting business from CPC's clients.

When the Cancellation Notice was sent, at the direction of Golisano, Rapid Payroll was earning a profit on the software licenses. Rapid Payroll president Turek did not even review his company's financial information before sending the Cancellation Notice, and bankrupted his company.

From this evidence, the jury could conclude that appellants intended to destroy CPC's business by terminating the Software License. This demonstrates the element of malice. Failing to give adequate notice was oppressive because it caused cruel and unjust hardship, in derogation of the rights CPC enjoyed under the non-cancellable Software License. Finally, appellants committed fraud by intentionally misrepresenting to licensees that they would expand software licensing and support licensees, while concealing their actual plan to use their acquisition of Olsen to damage the licensees' businesses and steal the licensees' clients in the chaos that occurred when the Software License was suddenly terminated.

The case cited by appellants does not support their position. Although a punitive damages award was reversed in *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 909-910, the award was based on a "particularly misleading coverage letter" from an insurance carrier, in which the insurer failed to adequately assess its insured's exposure to liability: the court found that this breach of the covenant of good faith and fair dealing was not sufficiently "despicable" to support punitive damages. (*Ibid*.) *Shade Foods* is not a case in which one business set out to destroy a competitor in an egregious manner, as described above.

b. Liability of Golisano

Golisano argues that "he decided to send the Cancellation Notice because he believed it was in the best interest of Paychex to do so," which is "consistent with his fiduciary obligation to the company and its shareholders." Golisano did not testify at trial. As a result, the jury was left with evidence showing that Golisano followed a strategy of falsely and publicly assuaging licensees' fears while secretly planning to take over their businesses by vaporizing the software that was their economic lifeline.[9]

Golisano contends that the punitive damages award against him is improper because the issue of the manager's privilege "is one of first impression." The manager's privilege is a rule that has been around for decades. (See *Olivet v. Frischling* (1980) 104 Cal.App.3d 831, 840-841.) That it was applied to Golisano and Turek is not novel, given that the two men asserted it as a defense at trial. As discussed previously, the evidence showed that Golisano and Turek bankrupted Rapid Payroll by causing the corporation to breach the software licenses, because its only business was supporting the licenses and collecting licensing fees. Golisano directed Turek to take this action, even though Rapid Payroll was earning $1 million per year on the licenses. The jury concluded that the individual defendants were not acting in the best interests of Rapid Payroll. Substantial evidence supports the award of punitive damages.

c. Due Process

Appellants argue that the punitive damages award violates due process because their conduct was not reprehensible. Specifically, appellants contend that the harm was only economic, not physical; there was no reckless disregard to the health or safety of

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9 According to the Paychex corporate minutes, Golisano "disarmed negative feelings" among the licensees. He did so by promising to expand licensing and provide "the best software for your payroll processing service."

others; the target of the misconduct was not financially vulnerable; this was not a repeated action but was only an isolated incident; and the harm was not the result of intentional malice, trickery or deceit, but was a mere accident. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419.) We review the amount of a punitive damage award de novo, to determine whether it is "constitutionally excessive"; however, findings of fact are subject to the usual rules of appellate deference. (*Simon v. San Paulo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172.)

The purpose of punitive damages is not to compensate the plaintiff but to publicly "punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." (*Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 266-267; *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046.) The harm inflicted by appellants was no accident: it arose from a plan to destroy CPC and other competitors' businesses through nefarious means. The totality of the evidence showed that Paychex acquired Olsen with the covert goal of terminating the software licenses, leaving licensees unable to perform payroll processing. Appellants took advantage of the chaos created by the Cancellation Notice to solicit competitors' disaffected clients. It was not an isolated incident of wrongdoing, but required extended deceitful conduct to keep licensees from converting to new software over the years. Appellants' conduct was sufficiently reprehensible to justify the imposition of punitive damages.

Finally, there is no merit to any claim that the punitive damages award is so high that it offends due process. The punitive damages award of $11 million was less than the compensatory damages of $15 million. Due process problems may arise when an award of punitive damages is greater than the award of compensatory damages. (*State Farm Mut. Automobile Ins. Co. v. Campbell*, *supra*, 538 U.S. at p. 429; *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1, 10-11.) The $10 million award against Golisano was less than 1 percent of the value of his Paychex stock. The $10,000 award against Turek was negligible. And the $1 million award against Paychex was extremely small, given the company's market value of $14.9 billion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.